

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

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GLORIA SCOTT AND *
DEANIA JACKSON, *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
*
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *

Transcript of proceedings before the
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Tuesday Morning Session
March 18, 2003
10:08 a.m.
* * * * *

I N D E X

Witness Page
IAN L. UYDESS
Examination by Videotaped Deposition 16106

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16105

1 Tuesday Morning Session
2 March 18, 2003
3 10:08 a.m.
4 * * * * *
5 P R O C E E D I N G S
6 * * * * *
7 (In open court with a jury present:)
8 THE COURT:
9 Good morning.
10 Plaintiffs counsel ready to continue
11 with the presentation of evidence?
12 MR. RUSS HERMAN:
13 Yes, Judge Ganuchau. Good morning
14 to you.
15 Good morning to you, ladies and
16 gentlemen of the jury.
17 This morning we are going to hear
18 from Dr. Uydess, who was a research person
19 at Philip Morris for about eleven years.
20 And we have got his video deposition.
21 Your Honor, it's going to last
22 somewhere between thirty and forty
23 minutes.
24 THE COURT:
25 All right. Let's start it please.
26 MR. RUSS HERMAN:
27 It's thirty minutes, Your Honor.
28 -- -- --
29
30
31
32

16106

1 IAN L. UYDESS
2 being previously duly sworn and presented by
3 videotaped deposition, testifies and says as
4 follows:

5 -- -- --
6 EXAMINATION
7 Q. Okay. Would you please state
8 your name for the record?
9 A. Ian L. Uydess.
10 Q. And your residential address?
11 A. [DELETED]
12
13 Q. Where are you currently
14 employed?
15 A. A company called PPD Pharmaco
16 in Richmond, Virginia.
17 Q. Dr. Uydess, one of the reasons
18 that you are here, I think, or at least
19 one of the focuses of my interrogation
20 will be a declaration that you made to the
21 FDA about a year ago on a number of
22 subjects.
23 Let me ask you a couple of questions
24 about the preparation or the genesis of
25 this declaration.
26 When did you first contact or when
27 did FDA investigators first contact you
28 with respect to the work that you did at
29 Philip Morris?
30 A. I don't recall the exact date.
31 I didn't keep track of that. It was
32 probably a year or so before this was
 16107

1 issued.
2 Q. We have a record that indicates
3 that I think around July of 1994 you told
4 various people at Philip Morris that you
5 had been contacted. Is that -- that would
6 be a little closer to two years or a year
7 and a half. Does that seem about right?
8 A. Possibly.
9 Q. How did that contact come
10 about?
11 A. I received a phone call from
12 one of their investigators.
13 Q. Who was that?
14 A. Gary Light.
15 Q. And did he say how he had
16 gotten your name?
17 A. No, did he not.
18 Q. What did he ask you to do on
19 that first occasion?
20 A. He asked if I would consider
21 meeting with him to discuss my experiences
22 within the tobacco industry.
23 Q. And what did you say on that
24 occasion?
25 A. I said I would like to think
26 about that.
27 Q. How about Dr. Gullotta, you
28 described him as a friend?
29 A. He at one time was my --
30 probably my closest friend.
31 Q. Best friend, closest friend?
32 A. Yes.

 16108
1 Q. He remained your closest friend

2 until you submitted the declaration to the
3 FDA; right?

4 A. From my point of view, he still
5 is one of my closest friends, but at the
6 time of that submission the friendship did
7 end.

8 Q. Now, in a little bit we are
9 going to get to the portions of your
10 declaration where you discuss Dr. Gullotta
11 and his work, make various statements
12 about him.

13 You knew at the time that you saw
14 him, at least on that last occasion, that
15 you were going to file a declaration that
16 was going to make those statements;
17 correct?

18 A. I believe that when I last saw
19 Frank and his wife with my wife for
20 dinner, it was at least a week or two or
21 three before my filing the statement, and
22 at that point I was probably still
23 wrestling with the decision to actually
24 file it.

25 So I can't swear at that time I
26 actually had made up my mind to do that,
27 no.

28 Q. At some time obviously you did
29 make the decision to go ahead and file a
30 statement about Dr. Gullotta and his work;
31 right?

32 A. Among other things, yes.

16109

1 Q. You didn't pick up the phone or
2 drop by again to see him and tell him
3 about that; is that right?

4 A. That is correct. I would have
5 liked to have been able to do that, but
6 did not.

7 Q. You say you would have liked
8 to. What stopped you?

9 A. My realization that this was
10 material that needed to be for the time
11 not publicized to someone at
12 Philip Morris. And for that reason, I
13 didn't say anything to him, although I
14 would have really liked to.

15 Frank was -- Frank and his wife and
16 my relationship with Frank and his wife
17 was a major consideration in my filing
18 this and the length of time it took me to
19 actually file it.

20 Q. You didn't even bother to check
21 with him to determine the accuracy of what
22 you were saying about his work; is that
23 right?

24 A. No. I didn't think that was
25 necessary.

26 Q. Because you think you knew what
27 he was doing?

28 A. I believed I had a general
29 understanding of the type of work he was
30 doing.

31 Q. Based on things that he had

32 told you in friendly conversation?

16110

1 A. Based on things that I had
2 discussed with Frank over eleven years and
3 had seen on almost a daily basis.

4 Q. When you say you saw it on a
5 daily basis, you would walk into his
6 laboratory and see that he was conducting
7 some type of experiment?

8 A. Yes.

9 Q. You weren't actually involved
10 in any of those experiments with
11 Dr. Gullotta; correct?

12 A. That's correct.

13 Q. So you made a decision to
14 describe Dr. Gullotta's work based on what
15 you had observed and from friendly
16 conversations to do this and not ask him
17 to verify in any way what you were going
18 to say; is that right?

19 A. Again, because I was relating
20 the general context of the type of work
21 that was being done, not specifics of
22 results or data.

23 I knew quite well the type of work
24 that was being done from being in the
25 facility for such a long time with him and
26 from hearing from him explanations of what
27 he was doing.

28 Q. What were the other
29 technologies that you think Philip Morris
30 did not use that in your judgment would
31 make cigarettes safer?

32 A. I think aspects of what they

16111

1 knew about the potential toxicity of a
2 variety of smoke components as they were
3 elucidated by the toxicology group. More
4 formal and expanded efforts to reduce
5 things like nitrate, nitrite, heavy metal,
6 nitrosamines, what they learned from their
7 various behavior studies on nicotine.

8 Q. Is that it?

9 A. Well, that's the ones that come
10 to mind.

11 Q. The components of cigarettes
12 that were elucidated by the toxicology
13 group, which components are you referring
14 to that in your judgment were used that
15 make a cigarette unsafe or less safe?

16 A. Things like nitrosamines.

17 Q. You are not suggesting that you
18 had information or that you have
19 information that Philip Morris
20 affirmatively adds to the natural tobacco
21 components which Philip Morris has data on
22 that indicates they are unsafe; is that
23 right?

24 A. Are you asking me do I
25 personally know if Philip Morris adds
26 things to its products they know to be
27 unsafe?

28 Q. Yes, that's my question.

29 A. In a general sense, I would
30 have to say yes, they do.
31 Q. What do they add to cigarettes
32 that they know to be unsafe, and how do
16112

1 you know that?

2 A. Well, I have to go back ten
3 years. I am speaking about while I was
4 there, things like preservatives,
5 insecticides that they know were there,
6 which they were concerned about. That's
7 one easy area.

8 Q. So they didn't tell you ever
9 that they were blending it in a certain
10 way to maintain a certain nicotine
11 content, did they?

12 A. They would never have told me
13 that they have selected Hogshead B,
14 because that's the one that has lots of
15 nicotine.

16 I was told and taught over the time I
17 was at Philip Morris that nicotine in leaf
18 was a principal parameter of what they
19 designed in their products.

20 It was not something that was
21 haphazard. It was not something that was
22 along for the ride. They knew where it
23 was.

24 When they used a leaf that had it,
25 they knew they were using a leaf that had
26 it, as well as a leaf that may not. It
27 was part of the design parameters of that
28 product.

29 Q. Who told you that Philip Morris
30 designed its products and selected its
31 blends according to nicotine content?

32 A. I didn't say that. I said it
16113

1 was one of the parameters.

2 Q. Who told you that Philip Morris
3 selected its products and selected tobacco
4 leaf based on one of the parameters of
5 nicotine content?

6 A. Leaf people, people like Dan
7 Teng, Henry Merritt, senior engineer,
8 principal engineer. When I --

9 Q. What you saw was that when it
10 had too high or too low nicotine, it
11 impacted on the likeability. Is that a
12 term you have heard?

13 A. Staying power.

14 Q. Staying power in terms --

15 A. In the marketing of the
16 product, yes.

17 There were products that
18 Philip Morris tested which apparently
19 tasted good, people liked the flavor,
20 smoked for a few weeks, and then went back
21 to their old product. Sometimes that was
22 being related to too low a level of
23 nicotine. That was the discussion.

24 Q. Which product?

25 A. The only one I really -- I

26 think I remember is, I think, Cambridge
27 which at one time there were three
28 articles, one of which had virtually no
29 nicotine, one of which had a moderate
30 level, one which had a slightly higher
31 level.

32 I don't know the exact levels that
16114

1 they were at, but there were reports that
2 the people would joke about the lowest
3 level as being a hot air delivery device.

4 And that's pretty much what they
5 learned in the marketplace that it had
6 some flavor I guess the people liked for a
7 short while, but people abandoned it
8 fairly quickly. So the take-home was it
9 was a nicotine -- too low nicotine related
10 problem.

11 Q. Do you have any specific
12 information that there is something that
13 Dr. Semen and his group know about
14 nicotine analogs that has not been
15 published, that they are keeping a secret?

16 A. I believe so.

17 Q. What?

18 A. Aspects of with regard to the
19 nicotine analog program and their work
20 with Dr. DeNoble, the guideline -- part of
21 the guideline for that program was to be
22 able to construct an analog of nicotine
23 which did not have the adverse
24 cardiovascular impact that nicotine does,
25 but it would still have the physiological
26 impact, the biological impact. Those
27 entities were identified.

28 I am not aware that information with
29 regard to those analogs having been made
30 and that they had this activity, the
31 physiological impact, the habituating,
32 addictive impact, I don't know if that was

16115

1 ever published. I don't remember seeing
2 anything like that.

3 Q. Okay. Have you ever seen a
4 document to back him up?

5 A. No.

6 Q. As of 1989, 1990 through,
7 Philip Morris through patents was
8 explaining that it had this program;
9 correct?

10 A. I have not seen those patents.
11 And I wasn't there then in 1990, so I
12 don't know.

13 Q. Were you ever told not to use
14 the word addictive by Philip Morris?

15 A. Absolutely.

16 Q. Who told you to do that?

17 A. Through my chain of command, it
18 came from I guess at some point in time, I
19 am not sure where it originated, but it
20 came down through probably Bob McCuen from
21 possibly -- I don't know. I'm not sure if
22 Kathy Ellis at that time was the manager.

23 But things like that come down
24 beginning in the early '80s and into the
25 mid '80s. There was a change in the
26 environment at Philip Morris, and we were
27 asked to be more cautious about using
28 words like cancer or carcinogen, addictive
29 or addiction.

30 And if you accidentally made any kind
31 of reference similar to that, it was
32 removed from whatever you were writing,

16116

1 because whatever you wrote was reviewed by
2 your management.

3 Q. Do you know anyone at
4 Philip Morris who used the term addiction
5 in a draft or whatever and then had it
6 removed, yes or no?

7 A. I would have to say to the best
8 of my recollection, no.

9 Q. And you believe that
10 Dr. Hoffmann was using it negatively when
11 he talked about favor bouquet?

12 A. I can't tell you what
13 Dr. Hoffmann meant by it. It's just very
14 obvious he's offset this possibly as a
15 signal to Philip Morris that he
16 understands that he's talking about it in
17 their terminology, you know, in this
18 document, but I don't know.

19 Q. In the terminology that
20 Philip Morris uses?

21 A. Would like to use, yes. That
22 we're not interested in nicotine as a
23 pharmacologically active agent, we're
24 interested in nicotine as a flavor. And
25 maybe they discussed that with him, I
26 don't know.

27 But again, nicotine is toxic,
28 noxious, bitter, and no one at
29 Philip Morris that I know of would
30 seriously consider it as a flavor additive
31 or as a beneficial flavorant system in
32 cigarettes.

16117

1 Q. Do you know that Philip Morris
2 introduced De-Nic into the marketplace?

3 A. As I've stated several times,
4 Philip Morris explored every possible
5 level of nicotine, especially for lowest
6 levels.

7 Q. Okay. Do you know that they
8 introduced it in ten different test
9 markets throughout the country?

10 A. I wouldn't know how many
11 markets they introduced it in.

12 Q. Do you know that they kept it
13 on the market for six months to a year to
14 try to build that market share?

15 A. I do not know that they did it
16 for that reason, no.

17 Q. And do you know that eventually
18 the product was a total failure and had to
19 be withdrawn?

20 A. I know that the product was
21 withdrawn, but I don't know why.

22 Q. So in this particular case,
23 Philip Morris, in your view, could have
24 made a safer cigarette because it had less
25 nicotine, from your view?

26 A. Uh-huh.

27 Q. They did so, they tried, and it
28 just didn't succeed because, in your view,
29 a denicotinized cigarette will not sell;
30 is that correct?

31 A. Not my view. Experience with
32 the company.

16118

1 And this is, again, something I've
2 learned from Philip Morris, that below a
3 certain level of nicotine, a product would
4 not survive in the market.

5 Again, that does not mean that you
6 can't keep a product like that out there
7 because it is in some way beneficial to
8 the smoker. It becomes a financial
9 decision, which I guess the company has to
10 make.

11 It's up to the company to make a
12 decision like that. And if it were me, I
13 would want to keep those products out
14 there to benefit the public, but it wasn't
15 my company.

16 Q. Are you aware that various
17 health groups attempted to force
18 Philip Morris to remove De-Nic from the
19 market, and petitioned the FDA and the FTC
20 to stop Philip Morris from selling that
21 product?

22 A. I have no real information
23 about that. I've heard something about
24 it, but I don't know anything about the
25 details of it, why they wanted that done.
26 I really don't know much about the
27 situation.

28 Q. Would you agree or disagree
29 with the comment that safer does not
30 belong in a discussion of cigarettes?

31 A. I personally do not -- I
32 personally, because I'm not ever and have

16119

1 never advocated abolition of the cigarette
2 industry, would prefer to see, myself, a
3 series of progressively safer products,
4 each one less damaging than the other,
5 made available to the American public, the
6 world.

7 And I know there are people who
8 would -- who would argue that unless it's
9 totally safe, it shouldn't be on the
10 market. But that's not how you handle an
11 industry and that's not what we do to
12 other industries.

13 The automobile industry is an
14 excellent example. We didn't stop
15 production of cars until somebody made a
16 perfectly safe car. We compelled that

17 industry to begin to make safe cars, and
18 we required it. And that's all I would
19 ask of the tobacco companies.
20 So I have advocated that these
21 companies should begin to make safer
22 cigarettes.
23 And that's why I went to
24 Philip Morris. That's what I was told I
25 would be doing. So it would be a
26 contradiction if I told you I didn't
27 believe that.
28 Q. What do you know that is not in
29 your declaration that you think someone at
30 Philip Morris misled somebody?
31 A. Things having to do with
32 nicotine delivery to the smoker, a subject

16120

1 like FTC versus actual delivery, and the
2 variety of conditions that can lead to
3 something like that.
4 Q. Let's talk about the FTC
5 issue.
6 Are you talking about the FTC method
7 for determining tar and nicotine delivery?
8 A. Yes.
9 Q. And you know Philip Morris has
10 done something in connection with that
11 that misleads smokers?
12 A. I believe Philip Morris knows
13 and has known for quite some time that the
14 FTC method of determining nicotine
15 delivery is one way of determining
16 nicotine delivery in a very static kind of
17 condition under that set of parameters in
18 that machine, and that nicotine delivery
19 can be measured in other ways.
20 And that when it's measured in other
21 ways, you get different numbers, sometimes
22 substantially different numbers.
23 Q. So is it your testimony that
24 you know someone at Philip Morris who has
25 denied that there are other ways of
26 testing it? Is that what you are saying?
27 A. No, I am not.
28 Q. You are saying Philip Morris
29 knows that there are different ways of
30 measuring tar and nicotine?
31 A. What I'm saying is that I know
32 that Philip Morris knows, R&D,

16121

1 Philip Morris' company knows that the
2 delivery of nicotine as measured by the
3 FTC machinery that measures nicotine are
4 not necessarily the actual delivery to the
5 smoker, and that it is, in fact, sometimes
6 quite a bit higher.
7 Q. So it's your understanding that
8 Philip Morris voluntarily puts the FTC
9 numbers in its advertisements or that it
10 does so pursuant to a judicial decree
11 involving the FTC?
12 A. I understand it's a regulatory
13 requirement.

14 Q. So let me -- I just -- we need
15 to understand so we'll be able to get
16 working on this. You understand that the
17 FTC method, as its name implies, is the
18 method officially sanctioned by the FTC,
19 the Federal Trade Commission of the United
20 States?

21 A. I understand it's the one
22 that's used by them, yes.

23 Q. And you further understand that
24 they require Philip Morris to put that
25 information in every advertisement;
26 correct?

27 A. Yes, I understand that.

28 Q. And you also understand that
29 Philip Morris, along with others, knows
30 that there are other ways of measuring tar
31 and nicotine yield; correct?

32 A. Yes, there are other ways of
16122
1 measuring tar and nicotine yield.

2 Q. Has Philip Morris ever stated
3 anywhere that the FTC method is the only
4 accurate method, to your knowledge?

5 A. Has Philip Morris ever stated
6 that the FTC method is the only method?

7 Q. Uh-huh, yes.

8 A. Not to my knowledge.

9 Q. Has Philip Morris ever stated
10 that the FTC method is superior to all
11 other possible methods and it's the one
12 that should be used apart from the fact
13 that they are required to use it?

14 A. Not that I am aware of.

15 Q. So far as you know,
16 Philip Morris is following the law and
17 judicial decree when it publishes those
18 numbers as it is required to do; isn't
19 that right?

20 A. With regard to -- I would
21 assume with regard to the requirement of
22 published FTC numbers, that they are
23 following those requirements.

24 Q. Now, apart from this issue, are
25 you aware of any other incidents where
26 Philip Morris or its management has misled
27 smokers or anyone else about the nature of
28 cigarettes?

29 A. I personally do believe from my
30 knowledge of Philip Morris that they did
31 not fully disclose the potential health
32 hazards, potential and real health hazards

16123
1 of smoking, again, during the time I was
2 there, late '70s into the '80s.

3 Q. What specific information do
4 you have about a health hazard that was
5 disclosed by Philip Morris that was not
6 available to the public?

7 A. Philip Morris knew a tremendous
8 amount about the biological activity of
9 smoke components. It spent tremendous
10 time and resources and scientific effort

11 examining that. It did it in a variety of
12 fashions both here in the U.S. and outside
13 of the U.S.

14 It probably knew more about the
15 health consequences, toxicity, potential
16 carcinogenicity of smoke components years
17 before other people did because of the
18 depth of its analysis, detailed work it
19 did in a variety of these areas, in
20 toxicology and in other areas like that.

21 It's my understanding, because I
22 never heard it disclosed to the public,
23 that that information was never made
24 available to the public. And so, yes, I
25 believe they withheld information from the
26 public in that area.

27 Q. Please give me one example
28 where anyone at Philip Morris denied a
29 certain type of biological activity, but
30 had evidence in their own studies that
31 that type of biological activity rose to a
32 level of being detrimental?

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1 A. While I was there, I would hear
2 my management in the company make
3 statements about not agreeing with the
4 data in the external literature, that it
5 was possibly faulty, out of context, that
6 they did not agree that their product had
7 this strong potential for adverse health
8 effects, and yet knew all the time that it
9 did.

10 Q. Please give me one specific
11 example of that event you just described?

12 A. I told you before, I can't give
13 you a specific study because I did not
14 work within the groups that did those
15 studies. But I believe there are other
16 people who can be asked about the specific
17 studies. And I'm not the right one to ask
18 about the specific studies.

19 Q. Can you give me such a study?
20 You've talked about it generically.
21 You've said that there were times when
22 people at Philip Morris denied something,
23 but they had a study that proved
24 otherwise.

25 Give me one concrete example where
26 Philip Morris had a study that
27 contradicted what it was saying publicly?

28 A. Again, all I can respond to
29 that is that Philip Morris, while I was
30 there, generally denied the adverse health
31 consequences of smoking. That's what they
32 said.

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1 And yet internally, they generated
2 their own data which showed that there
3 were very real dangers, if not potential
4 real dangers, toxic effects in a variety
5 of smoke components, gas-phased, solid-
6 phased, and that there are other people
7 who can give you specific information

8 about what they knew.

9 Q. Tell me about the nitrosamine
10 studies?

11 A. They would extract smoke, they
12 would separate the various classes of
13 nitrosamines, they would test these
14 various classes of nitrosamines in their
15 test systems.

16 They would get results which
17 indicated nitrosamines are very, very
18 toxic or potentially carcinogenic.

19 Q. Who told you that they had
20 conducted a study showing that
21 nitrosamines derived from cigarette smoke
22 in one of their studies had a toxic
23 effect?

24 A. Among other things.

25 Q. Who told you that?

26 A. I worked on projects in which
27 nitrosamines and the reduction of
28 nitrosamines was the target, and it was a
29 high priority.

30 And so the company, again, by virtue
31 of some of these other projects was aware
32 that in their product there were these

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1 entities that were substantially toxic.
2 It was discussed at meetings.

3 I think you are aware that there was
4 a recording, an alleged tape of a meeting
5 in which nitrosamine programs and the
6 variety of ways nitrosamines have always
7 been known could be removed chemically
8 from product was discussed.

9 And yet to my knowledge, at least
10 during the time I was at Philip Morris,
11 nothing of any magnitude was being done to
12 do that.

13 So again, I would have to say that
14 Philip Morris was aware of the hazards
15 from their own data, had technologies they
16 may have been able to apply at that time
17 or at least refine to apply, and didn't
18 choose to do so.

19 And so again, with respect to that,
20 did not disclose and did not do things
21 that I believe they could have done which
22 could have been disclosed to inform the
23 public.

24 Q. Were you ever told that one of
25 the results of one of these studies was
26 that Philip Morris had accomplished
27 something that had reduced the biological
28 activity of the cigarettes?

29 A. I was generally aware that
30 Philip Morris had technologies and knew
31 ways it could reduce the biological
32 activity of its products, and that there

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1 were a number of them, NOD, the
2 denitrification program being one, the
3 removal of cadmium being one, the
4 replacement of artificial preservatives

5 another.

6 I mean, there is a host of them. I
7 couldn't even begin to tell you how many
8 different chemical extraction procedures
9 were evaluated to extract things like
10 nitrosamines.

11 So, yes, I mean, there were a lot of
12 available, known technologies to reduce
13 the risk of smoking, but I'm not aware of
14 them being used in a product that was kept
15 in the marketplace irrespective of
16 possibly poor sales to be of a health
17 benefit to lower the risk to the smoker.

18 Q. Do you know of anything else as
19 fact where you believe Philip Morris has
20 acted in a manner detrimental to smokers?

21 A. I think we may have touched
22 upon this earlier, the area of what
23 Philip Morris truly understood and knew
24 about nicotine and had known for a long
25 time, probably going -- predating my
26 joining the company. Its indepth,
27 scientifically-based and evaluated
28 information about nicotine's contribution
29 to the smoking habit, we will call it.

30 Q. Are you talking about any work
31 other than the work of Dr. DeNoble and the
32 analog group which we've talked about and

16128

1 Dr. Gullotta, which we've talked about?
2 I'm just trying to understand what you're
3 talking about.

4 A. The historic information that
5 Dr. Dunn's group, behavioral psychology,
6 and others have acquired over the years
7 with regard to how important is nicotine
8 in our products, is it a flavor that
9 someone enjoys in their mouth, is it
10 something that actually reinforces the
11 repetitive habit of smoking.

12 That Philip Morris, probably more
13 than anyone because of its scientific
14 expertise and capabilities, knew more
15 about that than I personally believe
16 anyone in the world.

17 Had known about that, again, since
18 the time before I joined the company, and
19 was continually adding to that body of
20 information in a variety of forms having
21 to do with how people self-administrate
22 when using low delivery products, the
23 actual impact that nicotine has
24 physiologically on the system, that it was
25 not a liking that was similar to people's
26 wanting some chocolate or wanting to eat
27 other things like that, liking Coke.
28 Coca-Cola, I mean.

29 It was far beyond someone's enjoyment
30 of a product and was much more related to
31 someone's becoming addicted to a product.

32 And again, whatever terms you'd like

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1 to use and the industry would like to

2 replace with that word, habituation,
3 whatever, that Philip Morris knew a
4 tremendous amount about that.

5 Some people there, like Dr. Dunn,
6 found it just exceptionally interesting,
7 exciting about how it worked, and that
8 this was not disclosed to the public, nor
9 was any attempt made in Philip Morris'
10 products, again, during the period I was
11 there, to reduce that effect to the point
12 where they knew it would disappear and
13 would allow their customers to only enjoy
14 the flavor of smoking.

15 Q. What I'd like to ask, again, is
16 whether you are aware of any specific
17 finding by Dr. Dunn that was not published
18 and that, as a result of not being
19 published, consumers were misled and the
20 public was misled because there was some
21 detrimental fact that was not already in
22 the published literature?

23 A. I would have to say yes, again
24 pointing to this group of studies at that
25 time, early '80s -- late '70s, early
26 '80s.

27 The fact that measurements had been
28 made internal to Philip Morris on the
29 relationship between controlled levels of
30 nicotine being delivered on articles made
31 for that study on which nicotine was being
32 varied and the habit -- the smoking habit

16130

1 of the subject smoking those articles
2 being measured down to extraordinary
3 detail, again, at that time.

4 That information, as far as I know,
5 was not disclosed to the public, was
6 indicative of the strong relationship
7 between nicotine level and this repetitive
8 habit or addiction to smoking, and that
9 that information known by Philip Morris in
10 detail was not disclosed in the public
11 literature in all of its detail at that
12 time.

13 Q. Then you do know the dose range
14 or the yield ranges?

15 A. I explained that since I didn't
16 try to see those data, I wasn't trying to
17 find those data in that lab. I was trying
18 to learn from the mentors I had, like Bill
19 Dunn and others, things about the product
20 and why people used the product, and tried
21 to relate my work to it and tried to
22 understand how friends of mine, how their
23 work related to it.

24 But it was clear to me as a scientist
25 within Philip Morris that this group was
26 doing detailed, technically sound,
27 scientific investigation in an area
28 involving nicotine, its physiologic effect
29 on the smoker with regard to habituation,
30 addiction, repetitive behavior, that they
31 wanted to understand it.

32 They wanted to understand it, like in
16131
1 other areas, much more than anyone else
2 understood it, and that they generated
3 data in those areas relating an individual
4 smoking various levels of nicotine to the
5 smoking habit.
6 (End of videotaped presentation.)
7 THE COURT:
8 End of video?
9 MR. RUSS HERMAN:
10 May it please the Court, that
11 deposition was taken in 1997. It doesn't
12 show at the beginning, but we would like
13 to offer that first page that shows when
14 it was taken.
15 At this time, Your Honor, we have
16 some documents at issue that we have
17 talked to the Court and counsel about.
18 THE COURT:
19 Ladies and gentlemen of the jury, we
20 are required to do some things out of your
21 presence, so we are going to take our
22 midmorning recess at this point.
23 And I'm going to give you at least
24 fifteen minutes, but it could be longer
25 than that. So fifteen minutes from the
26 time you leave here, please be in the jury
27 lounge.
28 And I will send for you when we
29 finish what we need to do out of your
30 presence. So you have got at least
31 fifteen minutes, but it may be longer.
32 (In open court without a jury

16132

1 present:)
2 THE COURT:
3 Let the record reflect the jury has
4 left the courtroom.
5 Plaintiffs counsel, the handwritten
6 list that you have in your hand,
7 Mr. Herman, contains a list of exhibits.
8 MR. RUSS HERMAN:
9 Yes, Your Honor.
10 THE COURT:
11 And do I understand correctly that
12 the order in which they are listed is the
13 order in which you would like to present
14 them to the jury, if allowed to do so?
15 MR. RUSS HERMAN:
16 That is correct, Your Honor.
17 THE COURT:
18 What is the significance of the
19 documents listed below the heading
20 Advertising Expenditures toward the middle
21 of the page?
22 MR. RUSS HERMAN:
23 With respect to the first two, these
24 are defendants' web site information --
25 THE COURT:
26 No. Let me make my question clear to
27 you.
28 In what order would you like to

29 present the documents listed under
30 advertising expenses? Do they follow the
31 ones listed above?

32 MR. RUSS HERMAN:

16133

1 That is correct, unless Your Honor
2 rules that they are admissible. If they
3 are admissible, we would like to go to
4 those first.

5 THE COURT:

6 So if allowed to, you would like to
7 show the jury the documents listed under
8 advertising expenses in the order in which
9 they are listed but before the ones listed
10 higher on that sheet of paper?

11 MR. RUSS HERMAN:

12 That's correct. We have done this to
13 give the Court as much flexibility as the
14 Court may need to decide the issue.

15 THE COURT:

16 Well, it's my understanding that as
17 to 3074, that's the second to last one
18 listed under Advertising Expenses --

19 MR. RUSS HERMAN:

20 That is correct, Your Honor.

21 THE COURT:

22 -- that that document is in evidence
23 with these, but the second page was not
24 shown to the jury.

25 MR. RUSS HERMAN:

26 That is correct.

27 THE COURT:

28 None of the -- and look at the last
29 one listed, 15 --

30 MR. RUSS HERMAN:

31 That is the page of the testimony in
32 which the defendants cross-examined

16134

1 Dr. Arnett about FTC expenditures last
2 Thursday.

3 THE COURT:

4 I have that here.

5 MR. RUSS HERMAN:

6 Yes. The document immediately above
7 3074 is 3165.02. That document was
8 previously ruled on as admissible by you
9 in the Szymanczyk deposition.

10 THE COURT:

11 I understand that. All right.

12 Now, I have this schedule, which is
13 transmitted by cover letter dated
14 yesterday.

15 MR. RUSS HERMAN:

16 That's correct, Your Honor.

17 THE COURT:

18 And it calls this a list of documents
19 to be read to the jury March 18th. Do
20 defense counsel have this?

21 MR. GAY:

22 We do, Your Honor.

23 THE COURT:

24 Yes, all right.

25 Have the defense counsel had an

26 opportunity to verify the information in
27 the right-hand column where it purports to
28 give the date and the page at which the
29 deposition -- or the document, rather, was
30 admitted.

31 MR. WITTMANN:

32 Yes, Your Honor, I think so.

16135

1 THE COURT:

2 You have had a chance to verify

3 that?

4 MR. WITTMANN:

5 Uh-huh.

6 THE COURT:

7 Any disagreement?

8 MR. WITTMANN:

9 Not as to the RJR documents.

10 THE COURT:

11 Well, I don't know which are RJR

12 documents and I don't which are other

13 documents from this list.

14 I want to know if any of the

15 defendants dispute the notations in the

16 right-hand column on those three sheets

17 indicating which of those documents have

18 been admitted and the date.

19 MR. WITTMANN:

20 RJR does not, Your Honor.

21 MR. WILLIAMS:

22 As to B&W, there is no dispute that

23 281.01 has been admitted. The others as

24 to B&W have not been admitted as of this

25 date.

26 MR. SCHNEIDER:

27 That's this here.

28 MR. WILLIAMS:

29 Okay.

30 THE COURT:

31 Mr. Gay, do you have a response?

32 MR. GAY:

16136

1 Yes. No, Your Honor. Sorry, Judge.

2 THE COURT:

3 No, no quarrels with it?

4 MR. GAY:

5 No quarrels.

6 THE COURT:

7 All right. Mr. Williams?

8 MR. WILLIAMS:

9 Yes, Your Honor.

10 THE COURT:

11 Any quarrels?

12 MR. WILLIAMS:

13 No, I agree they are admitted.

14 THE COURT:

15 I have a second list from plaintiffs

16 counsel. What's the significance of that

17 list as compared to the first list I

18 talked about?

19 MR. RUSS HERMAN:

20 It was an earlier list that we

21 submitted of documents which we intend to

22 read before we rest. I don't think there

23 are duplicates on that list, and I don't
24 think that there are on the short list
25 those documents listed.
26 THE COURT:
27 So they are in addition to the list
28 we discussed first?
29 MR. RUSS HERMAN:
30 That is correct. What we are trying
31 to do is, because we believe there is
32 going to be some down time this week, make

16137

1 sure we have given notice of any document
2 that we might read this week.
3 And there was also another letter
4 sent, I believe, last Thursday -- well,
5 another letter sent on a summary document,
6 0452.02.

7 THE COURT:
8 I have that, and I have the
9 objections. But you don't intend to use
10 that today, do you?

11 MR. RUSS HERMAN:
12 No, we do not.

13 THE COURT:
14 That's a separate issue. I'm not
15 interested in discussing that today.
16 Looking at the handwritten list,
17 Mr. Wittmann, you were going to give me
18 your client's position with regard to the
19 ones starting with 0211.01 in terms of
20 reading those document portions to the
21 jury today. Are you ready to discuss
22 that?

23 MR. WITTMANN:
24 Yes, Your Honor.
25 0211.01 is a letter from Mr. McCain
26 of William Esty Company to a Mr. Watson at
27 RJR dated March 8th, 1973.

28 The objection to the document is it
29 is hearsay, it's from someone outside of
30 R. J. Reynolds Tobacco Company, not an RJR
31 employee.

32 It also contains hearsay within
16138

1 hearsay.
2 I also believe it is not relevant and
3 I also think it's prejudicial under Rule
4 403.

5 So for all those reasons, we would
6 object to the admissibility of that
7 document, Your Honor.

8 MR. RUSS HERMAN:
9 Your Honor --

10 THE COURT:
11 On 0164.01?

12 MR. WITTMANN:
13 0164.01, that's a French Camel -- do
14 you have that?

15 Just one moment, Judge. I have to
16 get some of those.

17 It's a letter dated February 7th --

18 THE COURT:
19 Just a moment. Plaintiffs counsel,

20 do we have Court copies of these
21 documents?
22 MR. RUSS HERMAN:
23 Yes, you do, Your Honor.
24 THE COURT:
25 Okay. Point them out to Ms. Mouton
26 so they can get them for me.
27 0164.01.
28 MR. WITTMANN:
29 Yes, Your Honor. It's dated February
30 7, '74, to Rick McReynolds from Dana
31 Blackmar.
32 THE COURT:

16139

1 It's another letter.
2 MR. WITTMANN:
3 It's a letter, it's on DFS Office
4 Memo letterhead. I don't know what that
5 letterhead relates to.
6 And for that reason, I just have to
7 object to it as hearsay and irrelevant.
8 It deals with an advertisement, and I'm
9 advised the advertisement ran in France.
10 For that reason, I don't think it's
11 relevant in this case.
12 THE COURT:
13 4597?
14 MR. WITTMANN:
15 Your Honor, that exhibit is in
16 evidence. Our objection to it is it's
17 repetitive and cumulative.
18 It's been referred to -- this is that
19 Diane Burrows memo, it was referred to on
20 February 7th, on February 10th, it was
21 referred to with Cummings.
22 It's been over and over and over
23 again discussed by witnesses, and I think
24 it's improper to have a document that's
25 been received in evidence, it's been
26 discussed by a witness, cross-examined on
27 while the witness was on the stand, and
28 then to take the same document and read it
29 to the jury to emphasize and highlight it.
30 THE COURT:
31 And 0201.01?
32 MR. WITTMANN:

16140

1 The same problem, Judge. It's a
2 document that's in evidence. It was used
3 with Arnett, Dr. Arnett. It was used also
4 I believe with Dr. Cummings.
5 This is a memo dated April 13th,
6 1984, to Mr. Fackelman from Mr. Nordine.
7 THE COURT:
8 I have it in front of me.
9 MR. WITTMANN:
10 We have been over it repetitively. I
11 think it's cumulative, and it's improper
12 to be allowed to be read yet again to the
13 jury for emphasis.
14 THE COURT:
15 Let's look at the Philip Morris
16 documents on that list; that is, 3162 and

17 the two below that.
18 MR. GAY:
19 Actually, the one below that, 3430,
20 is a Philip Morris document.
21 The 1403.02, which is listed as a
22 Philip Morris document, is not a
23 Philip Morris document. We just found
24 that out this morning.
25 THE COURT:
26 Well, what company does that refer
27 to, 1403.02, which you are referring to?
28 Does anybody know?
29 MR. MUEHLBERGER:
30 Your Honor, if I may? I have looked
31 at this. It doesn't refer to any specific
32 company. It's an abstract of an article

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1 that apparently appeared in a magazine.
2 We just received notice of it. We don't
3 even have a copy of the article yet, so we
4 can't tell you exactly what the article
5 says.

6 THE COURT:
7 All right. Mr. Gay, my note
8 indicates that 3162 is in evidence.

9 MR. GAY:
10 Yes, Your Honor.

11 THE COURT:
12 And 3430 is in evidence?

13 MR. GAY:
14 Yes, Your Honor.

15 THE COURT:
16 Is there any objection by
17 Philip Morris to reading those or parts of
18 those to the jury?

19 MR. GAY:
20 Your Honor, the objection we have is
21 to 3430. It was used with Mr. Bible, and
22 we have a cumulative objection.

23 THE COURT:
24 And as to 3162?

25 MR. GAY:
26 I don't think we have an objection to
27 that, Your Honor.

28 THE COURT:
29 And as to the B&W documents, are you
30 ready to talk about those, Mr. Williams?

31 MR. WILLIAMS:
32 Yes, Your Honor.

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1 As to 1859, this is a document, it
2 says a list of conclusions from Wave 9 and
3 the latest black study, black meaning
4 African-American.

5 First of all, it's not relevant to
6 any issue in this case.

7 But perhaps more importantly under
8 Article 403 and I think a motion in limine
9 that might have been heard that Your Honor
10 might have ruled on as premature, this
11 racial targeting is the focus of why this
12 document is to be used.

13 THE COURT:

14 I don't have a copy of 1859.
15 MR. LOUIS GERTLER:
16 Apparently you do have a copy
17 according to Regina.
18 MR. WILLIAMS:
19 Your Honor, I have a copy.
20 THE COURT:
21 I didn't know that I had it, but I do
22 have have 1859.
23 1859, 403 and --
24 MR. WILLIAMS:
25 Also First Amendment and preemption.
26 The focus here is that defendants'
27 advertising is wrong and particularly
28 defendants should not advertise to
29 minorities.
30 That claim is preempted for a lot of
31 reasons, but it also dovetails into the
32 racial targeting issue.

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1 THE COURT:
2 All right.
3 MR. WILLIAMS:
4 There is also advertising dollars
5 talked about in the document, and that
6 would be subject to Your Honor's ruling
7 last week, that that is prohibited, that
8 evidence is prohibited.
9 So those -- that outlines the
10 objections.
11 THE COURT:
12 And where are those references made?
13 MR. WILLIAMS:
14 There is a reference on page three,
15 the fourth paragraph, the annual cost of
16 the program.
17 And there is a reference on page two
18 under subsection four that begins Kool
19 spends 17.7 percent of its budget against
20 blacks.
21 And that targeting issue is the
22 primary objection to this document, the
23 racial targeting issue, which is not an
24 issue in this case.
25 As to the next document, Your Honor,
26 1734, this is a big document. It covers a
27 lot of territory.
28 The same issue regarding racial
29 targeting are in some of the document, not
30 all of it. So it's a 403 issue.
31 It's also a 402 issue. The document
32 talks about marijuana and those sorts of

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1 things.
2 The racial targeting issue is the
3 main issue. It's an old document, it uses
4 antiquated terms like the term, quote,
5 Negro, which everybody knows is old and
6 antiquated. There is no use putting that
7 before the jury, at least there is no
8 reason to that's relevant to this case.
9 THE COURT:
10 Well, do you have notice of what

11 portions of this document the plaintiffs
12 intend to read to the jury?

13 MR. WILLIAMS:

14 No, I don't have notice what
15 portions. It's a very big document.

16 And I would object to the entire
17 document coming in. If there is only one
18 portion that's going to be read and the
19 document itself is not coming into
20 evidence, we may be able to agree on
21 that.

22 But I haven't been given notice of
23 what portions are intended to be read.

24 The fourth -- or excuse me, it's
25 third document, 0127.02, this document
26 involves -- first of all, this is by a
27 British American Tobacco employee. This
28 is a hearsay document, and we object to it
29 on those grounds.

30 But more importantly, it deals with
31 issues irrelevant to this case,
32 specifically the positions of the

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1 governments of other countries,
2 undeveloped countries on cigarettes, which
3 has obviously nothing to do with the
4 case. Under 40 --

5 THE COURT:

6 Do you know what portion is going to
7 be read?

8 MR. WILLIAMS:

9 No, I do not, Your Honor.

10 It involves multiple topics also, but
11 I'm objecting to the document in its
12 entirety. If there is some portion that's
13 innocuous that's going to be read, then
14 maybe we can talk about it, as long as the
15 document itself doesn't come in.

16 As I said, 802, hearsay; 805, hearsay
17 within hearsay; relevancy, 402.

18 There is also an authentication
19 objection, 901. And there is case law
20 that says under the hearsay rule, there
21 has to be a witness that testifies that
22 this is a business record of British
23 American Tobacco that has to lay the
24 foundation for that under Rule 803.6, and
25 that is not done. That's the basis of the
26 hearsay objection.

27 So those are objections to that
28 document, Your Honor.

29 THE COURT:

30 I understood it was a practice in the
31 trial up to this point to inform the
32 opposition what sections would be read to

16146

1 the jury before you presented it.

2 You haven't done that in this case,
3 have you, Mr. Herman?

4 MR. RUSS HERMAN:

5 We haven't done it in every case.
6 Sometimes we have done it when we were
7 able to do it, but it was never ruled on

8 that we had to do it.
9 And I got notice this morning about
10 these issues. I do have documents which
11 are underlined in front of me.
12 THE COURT:
13 I recognize that the trial orders
14 don't address this specific issue and it
15 was an omission on our part, but I have
16 got the authority to make sure that this
17 trial is conducted fairly.
18 And I think the opposition has a
19 right to know what portions of the
20 documents will be read to the jury if
21 plaintiffs are allowed to read whatever
22 portions they want to read.
23 It's a long document.
24 MR. RUSS HERMAN:
25 I have a set that's underlined, Your
26 Honor.
27 THE COURT:
28 It might be, Mr. Williams indicates,
29 the objections might fall if they know
30 what's going to be read.
31 MR. WILLIAMS:
32 Your Honor, I requested that several
16147
1 weeks ago. Your Honor heard me and
2 said --
3 THE COURT:
4 I understand.
5 MR. WILLIAMS:
6 And Mr. Herman said he would do that,
7 and he did that the next time.
8 THE COURT:
9 I will give you folks time to do
10 that. We will recess for about ten
11 minutes.
12 MR. RUSS HERMAN:
13 I haven't had a chance to respond to
14 these objections.
15 THE COURT:
16 Well, it may be that you are winning
17 at this point.
18 MR. RUSS HERMAN:
19 Then I certainly don't want to
20 respond.
21 THE COURT:
22 If I need something from you, I will
23 ask --
24 MR. RUSS HERMAN:
25 Thank you, Your Honor.
26 THE COURT:
27 -- when I'm ready to hear it; okay?
28 MR. RUSS HERMAN:
29 Yes. We will yellow line their
30 copies.
31 THE COURT:
32 All right. We will recess for ten
16148
1 minutes.
2 (A recess is taken at 10:59 a.m.)
3 -- -- --
4 (In open court without a jury present

5 at 11:09 a.m.:)
6 THE COURT:
7 Does Philip Morris counsel have
8 notice of the portions of the documents,
9 3162 and 3430, that the plaintiffs intend
10 to read to the jury?
11 MR. GAY:
12 Not yet, Your Honor.
13 MS. SULZER:
14 Not yet, Your Honor.
15 MS. WESTENFELD:
16 I'm almost finished.
17 THE COURT:
18 Where is Mr. Wittmann?
19 THE CLERK:
20 I will get him.
21 MR. WITTMANN:
22 I'm sorry, Your Honor.
23 THE COURT:
24 I'm wanting to know if you have
25 notice of what plaintiffs intend to read
26 to the jury in the four documents that I
27 asked you to talk about?
28 MR. WITTMANN:
29 It appears that I do, yes.
30 THE COURT:
31 Mr. Williams, same question?
32 MR. WILLIAMS:
16149
1 Yes, Your Honor. I just got notice.
2 I am going through the documents right
3 now.
4 THE COURT:
5 Well, I will give you another ten
6 minutes. Maybe we will have made some
7 progress by then.
8 MR. WILLIAMS:
9 Thank you, Your Honor.
10 (A recess is taken at 11:10 a.m.)
11 -- -- --
12 (In open court without a jury present
13 at 11:23 a.m.:)
14 THE COURT:
15 Recess is over. Please be seated.
16 Do defense counsel have notice now of
17 what portions of the various documents the
18 plaintiffs wish to present to the jury?
19 Mr. Williams, let me start with you.
20 MR. WILLIAMS:
21 Yes, Your Honor.
22 THE COURT:
23 And have their designations softened
24 your position on 1734 and 0127.02?
25 MR. WILLIAMS:
26 Starting with 0127.02, not really,
27 Your Honor, because the portions they want
28 to read, these are the musings -- and I
29 honestly mean musings -- of a British
30 American Tobacco employee that have
31 absolutely nothing to do with B&W.
32 It has to do with glue sniffing, hard
16150
1 drugs, competition with cannabis, which is

2 marijuana.
3 THE COURT:
4 Okay. As to 1734?
5 MR. WILLIAMS:
6 Okay, 1734, the document itself I
7 still object to for all the reasons I
8 stated. If some of the portions on the
9 race stuff can be excluded, then I
10 wouldn't have as much a problem with it.
11 I know they want the youth stuff, and
12 although we strenuously object that that's
13 not in the case, Your Honor, but I'm not
14 talking about the youth stuff. I'm
15 talking about the black/white stuff, not
16 just black, but white also. That's not an
17 aspect of the case.
18 So I object to the youth, that aspect
19 of it. If we can look further and extract
20 that portion --
21 THE COURT:
22 Have you talked to plaintiffs counsel
23 in an attempt to resolve that or not?
24 MR. WILLIAMS:
25 I haven't had a chance, Your Honor.
26 It's a big document and I just went
27 through it this morning.
28 THE COURT:
29 All right. Mr. Wittmann, do you have
30 notice now of what portions of those four
31 documents I questioned you about that the
32 plaintiffs wish to use?

16151

1 MR. WITTMANN:
2 Yes, Judge.
3 THE COURT:
4 And your objections remain the same?
5 MR. WITTMANN:
6 Yes, they do.
7 THE COURT:
8 All right.
9 MR. WILLIAMS:
10 Your Honor, we didn't talk about
11 1859, that was also another document that
12 had not only race but the advertising
13 dollars in it.
14 THE COURT:
15 Yes. All right.
16 I'm now going to go through the
17 documents one by one, and I am going to
18 ask for argument by plaintiffs counsel
19 regarding the defense objections to these
20 documents.
21 Is defense counsel ready?
22 MR. RUSS HERMAN:
23 Yes, Your Honor.
24 The first is --
25 THE COURT:
26 I'm going to call them and ask you to
27 do it in the order I call it so I can get
28 them in front of me.
29 MR. RUSS HERMAN:
30 All right, Your Honor.
31 THE COURT:

29 Now, what's your schedule for the
30 afternoon?
31 MR. BRUNO:
32 1:30 the witness will be here.
16154

1 THE COURT:
2 Then we will do documents between
3 1:00 and 1:30.
4 Lunch will be 11:30 to 1:00.
5 Michelle, will you inform the jury?
6 Kendall, will you go with her? Those are
7 my instructions, lunch from 11:30 to 1:00.
8 Mr. Wittmann, briefly. Don't repeat
9 anything you have already said.
10 MR. WITTMANN:
11 Yes, Your Honor. This letter refers
12 to the National Family Opinion surveys we
13 talked about before. Dr. Arnett testified
14 on cross-examination he didn't know what
15 National Family Opinion was.
16 The National Family Opinion surveys
17 deal with many, many products besides
18 cigarettes. These are done by an outside
19 agency, not done by R. J. Reynolds.
20 I submit it's prejudicial, the
21 inference to be R. J. Reynolds is running
22 surveys of underaged smokers. They are
23 not. This is data collected by an outside
24 company.
25 It's hearsay within hearsay. This is
26 information picked by William Esty
27 Company, advertising agency, and it is not
28 a document that was generated by R. J.
29 Reynolds.
30 THE COURT:
31 On 164.01, DFS Office Memo.
32 Mr. Herman, there is a letter -- there is
16155

1 a relevance objection to that. Do you
2 wish to address it?
3 MR. RUSS HERMAN:
4 Would you mind giving me that number
5 again?
6 Here it is.
7 MS. DeSUE:
8 Your Honor, this document is an
9 example of the pattern of conduct that RJR
10 was using as far as targeting youth as
11 evidenced by the first paragraph of the
12 document.
13 THE COURT:
14 All right. Mr. Wittmann, do you want
15 to talk about that briefly? You already
16 talked --
17 MR. RUSS HERMAN:
18 It's also copied to RJR people.
19 MR. WITTMANN:
20 Yeah, it related to advertising ran
21 in France, and nobody in this class was
22 exposed to anything that happened in
23 France, that I know of.
24 MR. RUSS HERMAN:
25 The document actually says it would

26 work equally well, if not better, for
27 Camel Regular. It's about as young as you
28 could get.
29 THE COURT:
30 One lawyer per side per document.
31 Anything else, briefly?
32 MR. RUSS HERMAN:

16156

1 No, Your Honor.
2 MS. DeSUE:
3 No, Your Honor.
4 THE COURT:
5 4597?
6 MR. WITTMANN:
7 That's in, Your Honor. That's the
8 cumulative, repetitive objection. It's in
9 evidence.
10 THE COURT:
11 But it's in evidence.
12 MR. WITTMANN:
13 Yes.
14 THE COURT:
15 And so is 0241.01; correct?
16 MR. WITTMANN:
17 That is correct.
18 THE COURT:
19 All right. I don't need to hear any
20 argument on those two.
21 Mr. Gay, you had no objection to
22 3162.
23 You indicated that you had an
24 objection to 3430, that it was cumulative,
25 repetitive, that sort of thing?
26 MR. GAY:
27 And it's just the very end of the
28 paragraph on the front page that begins,
29 the last couple of sentences, "The teenage
30 years are," and he had Mr. Bible read that
31 in his deposition. So it's cumulative,
32 Judge.

16157

1 THE COURT:
2 All right.
3 MR. GAY:
4 That's all.
5 MR. RUSS HERMAN:
6 Your Honor, I met with Mr. Sholes,
7 and we marked the entire document with
8 both what they wanted read and we wanted
9 read.
10 THE COURT:
11 Do you want to respond now to the B&W
12 documents?
13 MR. RUSS HERMAN:
14 Yes, Your Honor.
15 MR. LOUIS GERTLER:
16 Yes.
17 MR. RUSS HERMAN:
18 I will handle the first one. It's
19 281.01. It's already in evidence.
20 MR. WILLIAMS:
21 There is no objection to that, Your
22 Honor.

23 THE COURT:
24 No, I'm -- I have no objection to
25 that one, so I'm not interested in --
26 MR. RUSS HERMAN:
27 Mr. Gertler has got the other ones.
28 MR. LOUIS GERTLER:
29 Which one would you like me to start
30 with?
31 THE COURT:
32 0127.02.

16158

1 MR. LOUIS GERTLER:
2 Your Honor, the first thing that's
3 important about this document is the
4 author, who is David Creighton.
5 Mr. Creighton, as Mr. Williams points
6 out, was a high ranking scientist in the
7 Research and Development Center at BATCO,
8 which as you know, Your Honor, we have
9 pointed out ad nauseum did all the
10 fundamental research for Brown &
11 Williamson.
12 So this is a presentation by the same
13 scientist who did the fundamental research
14 in England for Brown & Williamson and
15 other affiliated companies.
16 It's obviously then an 801 (d)(3)
17 nonhearsay document because he's --
18 Mr. Creighton is doing the research, he is
19 an agent obviously of Brown & Williamson,
20 and therefore this is a statement of an
21 agent being used against a party, in this
22 case, Brown & Williamson.
23 I even did some research last night
24 on the internet, and I got a copy of the
25 agenda for the meeting.

26 THE COURT:
27 Any response, Mr. Williams?
28 MR. WILLIAMS:
29 Yes, Your Honor. This document is
30 not about research at all. It's
31 structure, creativity, and Mr. Creighton
32 is -- Dr. Creighton or Mr. Creighton is

16159

1 not acting as an agent for B&W in this
2 document. He is a BATCO employee.

3 THE COURT:
4 What does the handwriting up at the
5 very top, PTX 7926, mean, do you know?

6 MR. WILLIAMS:
7 No, I don't, Your Honor.

8 MR. LOUIS GERTLER:
9 That was on the original, Your Honor.

10 MR. WILLIAMS:
11 It says it was produced in another
12 case, so it may have something to do with
13 that. And BATCO was a party in that
14 case. It says Florida AG.

15 THE COURT:
16 Let's talk about 1734, racial
17 references. Mr. Gertler, is that your
18 responsibility?

19 MR. LOUIS GERTLER:

20 Yes, I will respond to that briefly,
21 Your Honor.
22 If we -- there is one thing I don't
23 understand, Your Honor. On the one hand
24 defendants say there is nothing wrong with
25 targeting minorities, going after a
26 minority marketplace. On the other hand,
27 they claim prejudice any time a document
28 has the word black in it.
29 Kool was a brand that was marketed
30 to --
31 THE COURT:
32 Is this the one that has the word --

16160

1 did you say this had a connotation --
2 MR. SINGLETON:
3 Negro.
4 MR. WILLIAMS:
5 No.
6 THE COURT:
7 That's a different document?
8 MR. WILLIAMS:
9 Yes, Your Honor.
10 THE COURT:
11 Go ahead.
12 MR. LOUIS GERTLER:
13 I mean, this document just
14 innocuously talks about blacks being a
15 part of the marketplace. We are mainly
16 using it for youth targeting.
17 But if we couldn't introduce Brown &
18 Williamson documents that had the word
19 black in it, Your Honor, we would not be
20 able to introduce hundreds of documents
21 because that was the market for Kool
22 cigarettes.
23 I don't find anything prejudicial
24 about talking about black people in a
25 document. There is no offensive statement
26 made about black people in the document.
27 It just mentions black people and black
28 youth as being who they are marketing
29 their cigarettes to.
30 Certainly the prejudicial value
31 doesn't outweigh the probative value,
32 which is that it talks extensively about

16161

1 marketing to children in this document.
2 THE COURT:
3 All right. There was an issue
4 brought up with regard to opening the door
5 on the advertising, which has to do with
6 the documents listed under the heading
7 Advertising Expenditures on the
8 handwritten list, and I believe would also
9 include Exhibit 1859 that is on the list
10 above that heading. Correct?
11 MR. RUSS HERMAN:
12 That's correct.
13 THE COURT:
14 Are defendants counsel ready to
15 respond to the motion for admission of
16 testimony and evidence regarding

17 defendants' advertising expenditures at
18 this time? That's the one you got today.

19 MR. MUEHLBERGER:

20 Your Honor, it was handed to me 15
21 seconds ago. I haven't even read it in
22 its entirety.

23 THE COURT:

24 Well, Mr. Wittmann had it about an
25 hour ago, and the question is are you
26 prepared to respond at this point?

27 MR. WITTMANN:

28 I would like an opportunity to
29 respond to this brief which I was served
30 with about an hour ago, which we can start
31 on this afternoon when we go back to the
32 office.

16162

1 MR. RUSS HERMAN:

2 Well, we will withdraw the brief. We
3 think the issue is very simple. You had
4 two briefs --

5 THE COURT:

6 The question is are you ready to
7 respond to this motion at this point or
8 not. Defense counsel, Mr. Wittmann,
9 first, and then I will illicit all the
10 others.

11 MR. WITTMANN:

12 No, Your Honor, I would like some
13 time.

14 MR. SCHNEIDER:

15 We would prefer an opportunity to do
16 so, Your Honor.

17 THE COURT:

18 Philip Morris?

19 MR. SHOLES:

20 Not at this time, Your Honor.

21 THE COURT:

22 All right.

23 MR. LOUIS GERTLER:

24 Your Honor, in terms of 1859, we can
25 agree to temporarily redact it. There is
26 one mention of the cost of an advertising
27 campaign in there which we are not showing
28 to the jury and which can be easily
29 redacted if Your Honor decides that is not
30 relevant to the case.

31 THE COURT:

32 I think the issue of whether the door

16163

1 has been opened as to advertising
2 expenditures by the cigarette
3 manufacturing companies is something that
4 I need to consider, and I don't have the
5 time and I won't have the input from
6 defense counsel on that issue.

7 If, however, the advertising issue in
8 1859 can be removed, then I will hear
9 discussions about the other objections.

10 The only other objection I noted to
11 1859 was the 403. Mr. Williams, is that
12 accurate?

13 MR. WILLIAMS:

14 Yes, Your Honor. Yeah, the racial
15 issue, the black study. We believe that
16 should be removed for the reasons that I
17 have talked about.
18 THE COURT:
19 Well, Mr. Gertler is offering to take
20 out on page -- I think it was page two you
21 are talking about.
22 MR. WILLIAMS:
23 That's the advertising information.
24 And there is a reference on -- well, if
25 they don't plan to read it and if the
26 document is not coming in, then it's a
27 nonissue.
28 MR. LOUIS GERTLER:
29 Well, we want the document to come
30 in, Your Honor, but we will be happy to
31 redact that small part that mentions the
32 costs of one advertising campaign.

16164

1 MR. WILLIAMS:
2 There is two parts, and there is more
3 of an issue if the document in its total
4 is coming in.
5 THE COURT:
6 I understand what you are saying,
7 Mr. Williams. But they are offering to
8 remove from the document the reference to
9 the dollars. I guess that's on page two,
10 about in the middle, two million.
11 MR. WILLIAMS:
12 That addresses the advertising
13 objection.
14 THE COURT:
15 Yes, I understand that.
16 MR. WILLIAMS:
17 But not the --
18 THE COURT:
19 And it appears somewhere else,
20 apparently on Paragraph No. 4 on page
21 three.
22 MR. WILLIAMS:
23 That's correct, Your Honor.
24 THE COURT:
25 Okay.
26 MR. WILLIAMS:
27 Your Honor, the document with the
28 antiquated term Negro was 1734.01. Your
29 Honor asked that a few minutes ago.
30 THE COURT:
31 All right.
32 MR. LOUIS GERTLER:

16165

1 And we will be happy to agree to
2 redact that one mention of whatever, the
3 term Negro, we will be happy to redact
4 that mention.
5 MR. WILLIAMS:
6 That's honorable, and I appreciate
7 that. But there are similar issues
8 throughout the document.
9 MR. LOUIS GERTLER:
10 No, but I mean --

11 MR. RUSS HERMAN:
12 We want to use that. Martin Luther
13 King used that term in three speeches.
14 MR. WILLIAMS:
15 You are not him.
16 MR. RUSS HERMAN:
17 No, and neither are you.
18 MR. WILLIAMS:
19 I don't purport to be.
20 THE COURT:
21 Gentlemen, calm down.
22 The objections to Document 0211.01,
23 overruled.
24 The objections to document 0164.01,
25 overruled.
26 The objections to 4597 and 0241.02 as
27 repetitive are overruled.
28 The objection as to 3162 as
29 repetitive -- I'm sorry, there is no
30 objection to 3162 as I have noted.
31 MR. SHOLES:
32 You are correct, Your Honor.

16166

1 THE COURT:
2 The objection to 3430 as cumulative
3 is overruled.
4 MR. SHOLES:
5 Thank you.
6 THE COURT:
7 The objection to 1859, with the
8 redaction of the advertising dollars on
9 that document, is overruled.
10 The objection to 1734, with the
11 removal of the racial adjective, is
12 overruled.
13 And the objections to 0127.02 are
14 overruled.
15 It would seem to me that it would be
16 appropriate to fill the time between
17 1:00 p.m. and the witness' appearance with
18 reading these documents, and I will make
19 this comment at this point.
20 I recognize that the trial orders
21 don't address this specific issue; we just
22 didn't have notice of it. But it would
23 have saved about two hours of jury time if
24 earlier notice had been given and this
25 discussion that we just are completing
26 could have been held at some time other
27 than when the jury should have been in the
28 box listing to evidence.
29 And I would suggest that in the
30 future of this trial, it would save time
31 and it would be easier for the Court to
32 deal with it if some advance notice were

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1 given of this sort of thing in the future,
2 both in this phase and whatever other
3 phases of this trial occur in the future.
4 MR. RUSS HERMAN:
5 Your Honor, we will endeavor to do
6 that. We will also underline in advance,
7 twenty-four hours in advance, we will give

8 forty-eight hours notice of the numbers of
9 the documents.

10 We want to tell the Court we have
11 given them notice of some 72 documents
12 that we intend to read when there are
13 breaks in the trial.

14 THE COURT:

15 I understand that. I want the
16 process to be smoothed out a bit in the
17 future.

18 MR. RUSS HERMAN:

19 Yes. Your Honor --

20 THE COURT:

21 When will defendants be ready to
22 address the motion as to the advertising?
23 Are you ready to tell me that at this
24 point?

25 MR. WITTMANN:

26 Your Honor, we would like to file a
27 brief, and I think we can do it tomorrow
28 morning.

29 THE COURT:

30 You have got to file a brief. When
31 do you expect you will find the brief?

32 MR. WITTMANN:

16168

1 This afternoon if we get it ready in
2 time.

3 THE COURT:

4 Well, I will revisit that subject
5 maybe during the afternoon recess.

6 MR. BRUNO:

7 Your Honor, if I may, Dr. Levie only
8 has available this afternoon to testify.
9 May we put him on the stand at 1:00 to get
10 him --

11 THE COURT:

12 Can you get him here at 1:00?

13 MR. BRUNO:

14 Yes.

15 THE COURT:

16 Well, if we can get him here at 1:00,
17 we will put him on at 1:00.

18 We will be in recess until 1:00.

19 (A luncheon recess is taken at
20 11:44 a.m.)
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1 REPORTER'S CERTIFICATE
2

3 I, NICHOLAS A. MARRONE, CCR, Registered

4 Merit Reporter, do hereby certify that the foregoing

5 proceedings were reported by me in shorthand and
6 transcribed under my personal direction and
7 supervision, and is a true and correct transcript,
8 to the best of my ability and understanding.

9 That I am not of counsel, not related to
10 counsel or the parties hereto, and not in any way
11 interested in the outcome of this matter.

12

13

14

NICHOLAS A. MARRONE (CCR 21011)
CERTIFIED COURT REPORTER
REGISTERED MERIT REPORTER

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